



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 231109-0265]

RIN 0648-BK06

Modification of Deadlines Under the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and
Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to revise the regulations implementing the
import provisions of the Marine Mammal Protection Act (MMPA). This final rule
extends, by two years, the exemption period to end December 31, 2025.

DATES: This final rule is effective [*insert date of publication in the FEDERAL
REGISTER*].

FOR FURTHER INFORMATION CONTACT: Kellie Foster-Taylor, Office of
International Affairs and Commerce, NMFS by email mmpa.loff@noaa.gov or by phone
at 301-427-7721.

SUPPLEMENTARY INFORMATION:

Background

The 2016 final rule

On August 15, 2016, NMFS published a final rule (81 FR 54390) implementing
the MMPA Import Provisions (Section 101(a)(2)). Section 101(a)(2) of the MMPA
prohibits “the importation of commercial fish or products from fish which have been
caught with commercial fishing technology which results in the incidental kill or

incidental serious injury of ocean mammals in excess of United States standards.” 16 U.S.C. 1371(a)(2). In the 2016 final rule, NMFS explained that “a fish or fish product caught with commercial fishing technology which results in the incidental mortality or incidental serious injury of marine mammals in excess of U.S. standards is any fish or fish product harvested in an exempt or export fishery for which a valid comparability finding is not in effect.” 50 CFR 216.24(h)(1)(i). A “comparability finding” is “a finding by the Assistant Administrator [for Fisheries] that the harvesting nation for an export or exempt fishery has met the applicable conditions specified in [50 CFR 216.24(h)(6)(iii)] subject to the additional considerations for comparability determinations set out in [50 CFR 216.24(h)(7)].” *Id.* § 216.3. The 2016 final rule set forth those conditions in detail, which measure the effectiveness of the harvesting nation’s regulatory program as compared to the U.S. regulatory program, as well as the procedure for issuing a comparability finding. The rule established that fish and fish products from fisheries identified in the List of Foreign Fisheries (LOFF) can be imported into the United States only if the harvesting nation has applied for and received such a comparability finding from NMFS.

The 2016 final rule provided, however, that this import prohibition “shall not apply during the exemption period” (50 CFR 216.24(h)(2)(ii)), which the rule initially defined as a five-year period. NMFS explained that this exemption period was necessary to provide harvesting nations with adequate time to assess marine mammal stocks, estimate bycatch, and develop regulatory programs that mitigate that bycatch. The 2016 final rule stated that NMFS “shall determine whether to issue” comparability findings “[n]o later than November 30th of the year when the exemption period ... is to expire.” *Id.* § 216.24(h)(6)(ii); *see also* 50 CFR 216.24(h)(8)(i) (“No later than November 30th of the year when the exemption period ... is to expire, the Assistant Administrator shall publish in the Federal Register, by harvesting nation, a notice of the harvesting nations

and fisheries for which it has issued or denied a comparability finding and the specific fish and fish products that as a result are subject to import prohibitions under paragraphs (h)(1) and (9) of this section.”).

Subsequent extensions of the exemption period

On November 3, 2020, NMFS issued an interim final rule (IFR) (85 FR 69515), which extended the exemption period for one year and requested public comment. The 2020 interim final rule sought to provide additional time for harvesting nations to apply for comparability findings and to comply with the requirements for such findings set forth in the 2016 final rule in light of the disruptions caused by the coronavirus pandemic. On October 21, 2022, NMFS issued a final rule (87 FR 63955), which responded to the comments received in response to the 2020 IFR and revised that rule to extend the exemption period by an additional year, until December 31, 2023, to give NMFS additional time to complete its assessment of the applications for comparability findings.

Under the current exemption period, therefore, NMFS must “determine whether to issue” comparability findings by “[n]o later than November 30th of” 2023 (50 CFR 216.24(h)(6)(ii)).

Current Rule: Further Extension of the Exemption Period

NMFS received 134 applications for comparability findings from nations involving almost 2,500 foreign fisheries. Nations apply for comparability findings for each of their fisheries on the LOFF; however, comparability determinations are made on a fishery-by-fishery basis, not by country. Thus, individual determinations need to be made for each fishery. To review applications for comparability findings, NMFS evaluates each nation’s regulatory programs to address incidental and intentional mortality and serious injury of marine mammals in each fishery that exports fish and fish products to the United States. The evaluation includes assessing information provided in the applicants’ submissions and readily available scientific information. The process also

includes, when necessary, consulting with applicant nations to clarify ambiguous statutory or regulatory text, address data gaps, or request elaboration on their marine mammal bycatch mitigation regulatory program. Ultimately, the Nation's regulatory program, as described in its application, must be evaluated for consistency with the MMPA import provisions and the MMPA domestic statutory and regulatory provisions governing marine mammal bycatch in U.S. fisheries.

After careful deliberation, the Department of Commerce and NMFS have determined that additional time is necessary to complete the evaluation process, given the large number of foreign fisheries, the evolving nature of fisheries data, and the practical challenges of assessing the comparability of the regulatory programs in foreign countries. This extension would allow time to ensure that comparability determinations are fairly and consistently applied across harvesting nations and their fisheries. In the event NMFS identifies a need to further extend the exemption period or otherwise amend the 2016 final rule to ensure the effectiveness of the regulatory measures of foreign fisheries, NMFS intends to provide prior notice, solicit public comment, and finalize any such amendments within the extended exemption period provided under this rule.

Therefore, NMFS is extending the exemption period by two years to December 31, 2025.

Classification

This rule is published under the authority of the Marine Mammal Protection Act, 16 U.S.C. 1371. The NMFS Assistant Administrator has determined that this final rule is consistent with the Marine Mammal Protection Act and other applicable laws. Under NOAA Administrative Order (NAO 216–6), the promulgation of regulations that are procedural and administrative in nature are categorically excluded from the requirement to prepare an Environmental Assessment.

Administrative Procedure Act

This final rule is exempt from the provisions of the Administrative Procedure Act (APA) that require advance notice and prior opportunity for public comment, as well as a 30-day delay in effectiveness, because it involves a “foreign affairs function of the United States” under 5 U.S.C. 553(a)(1). Courts have held that this foreign affairs exception covers certain rules involving restrictions on importation of foreign goods. *See Am. Ass’n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (applying the foreign affairs exemption because “[p]rior disclosure of the Government’s intention ... to impose stricter import restrictions would ‘provoke definitely undesirable international consequences’”); *Mast Industries, Inc. v. Regan*, 596 F. Supp. 1567, 1583 (Ct. Int’l Trade 1984) (“to the extent that the interim regulations define or alter quantitative limitations in bilateral trade agreements or unilaterally imposed restrictions on textile imports, they ‘clearly and directly’ involve a ‘foreign affairs function’ and are exempt from the prior notice and comment provisions of the APA”).

This rule falls under that exception. Under the 2016 final rule, as subsequently amended, the current exemption period is set to expire on December 31, 2023. And as explained above, NMFS is not able to finalize comparability findings by November 30, 2023 (as currently required under the 2016 final rule). Thus, if an extension of that exemption period is not in effect by December 31, 2023, importation of fish and fish products from all fisheries in the 134 countries that have applied for a comparability finding would be banned, thereby impairing U.S. trade interests and prompting “definitely undesirable international consequences.” H.R. Rep. No. 79–1980, at 257 (1946) (explaining that the foreign affairs exception applies to “‘affairs’ which so affect the relations of the United States with other governments that, for example, public rulemaking would provoke definitely undesirable international consequences”).

Pursuant to 5 U.S.C. 553(b)(B) and (d)(3), NMFS also finds good cause to issue this final rule without advance notice or prior opportunity for public comment, as well as a 30-day delay in effectiveness, because such notice and public procedure would be contrary to the public interest. Were NMFS to seek public comment, the inherent delay attendant to such procedure would make it practically infeasible to issue a final rule before the expiration of the current exemption period on December 31, 2023. And because NMFS is not able to issue comparability findings by November 30, 2023, without an extension, it would be unlawful as of January 1, 2024, for all 134 applicant nations to export fish or fish products from any of the approximately 2,500 fisheries to the United States. Such consequences would undermine U.S. trade and adversely affect U.S. consumers.

Finally, this final rule is not subject to the 30-day delay in effectiveness for the additional reason pursuant to 5 U.S.C. 553(d)(1) that it “relieves a restriction.” This final rule does so by extending the current exemption period and thereby avoiding the impending ban on importation of fish and fish products from fisheries on the LOFF.

Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866, as amended by Executive Order 14094.

Paperwork Reduction Act

This final rule contains no new or revised collection-of-information requirements subject to the Paperwork Reduction Act.

List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Exports, Marine mammals, Reporting and recordkeeping requirements.

Dated: November 13, 2023.

Janet Coit,
Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216 is amended as follows:

**PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING
OF MARINE MAMMALS**

1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

2. In § 216.3, the definition for "Exemption period" is revised to read as follows:

§ 216.3 Definitions.

* * * * *

Exemption period means the period during which commercial fishing operations that are the source of exports of commercial fish and fish products to the United States will be exempt from the prohibitions of § 216.24(h)(1). The exemption period extends through December 31, 2025.

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